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No. 06-1505 4-11-08

IN THE

Supreme Court of the United States

Clifford B. Meacham, *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory, *et al.*

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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By its terms, the RFOA provision applies only to conduct that is "otherwise prohibited" elsewhere in the ADEA. As a result, it is naturally read as an exemption from liability. And this Court has long treated such exemptions as affirmative defenses, absent some strong indication of legislative intent to the contrary. Pet. Br. 20-23.

Respondents insist that appearances are deceiving in this case. Although the RFOA provision *seems* to exempt otherwise unlawful conduct, they say, in reality it simply restates, in negative form, an element of the unlawful employment practice defined by Section 4(a)(2) of the Act. That is, unless an employment practice is unreasonable, they insist, it cannot have a disparate impact on older workers "because of" their age, a requirement embedded in Section 4(a)(2)'s definition of an unlawful employment practice. Accordingly, respondents argue, the plaintiff needs to demonstrate that the employer's conduct was unreasonable in order to prove that the defendant's conduct is unlawful under Section 4(a)(2). The RFOA provision thus simply restates what would otherwise go without saying, rather than providing an affirmative defense for conduct that would be "otherwise prohibited" by the statute but for its reasonableness.

Respondents seem to be aware that this interpretation faces substantial textual obstacles. For one thing, although respondents say that the RFOA provision merely restates a part of the definition of an unlawful employment practice, it is set out as a clause in a sentence that establishes two undisputed affirmative defenses. And, as mentioned before, it is expressed using the language and

structure of an affirmative defense, exempting from liability conduct "otherwise prohibited" by the Act.

In addition, the expressly definitional provision, Section 4(a)(2), describes the unlawful employment practice in an ADEA disparate impact case using the same language as Section 703(a)(2) of Title VII. And in *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that Congress intended the identical language in Section 703(a)(2) of Title VII and Section 4(a)(2) of the ADEA to have the same meaning. *Id.* at 233-34 (plurality opinion). But while both provisions prohibit only actions that have a disparate impact "because of" a protected characteristic, this Court has not construed Title VII to require proof of unreasonableness.

Undeterred, respondents claim that Congress did not really mean what it seemed to say, and neither did this Court. Although the Court seemingly said in *City of Jackson* that Congress meant the same test – the one laid out in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) – to define the meaning of the common language in the disparate impact provisions of Title VII and the ADEA, 544 U.S. at 240, respondents insist that all the Court really meant was that one feature of *Wards Cove* – its reiteration of the general principle that the plaintiff bears the burden of proving its case-in-chief – applies to both statutes. And, they say, although Congress used the same language in Title VII and the ADEA, it could not have meant that language to have the same meaning. For this conclusion, they point to nothing in the language or legislative history of either statute. Instead, respondents and their amici simply assert that given the differences between age and other kinds of discrimination, it makes sense as a matter of policy to require plaintiffs to prove the

unreasonableness of an employer's conduct in ADEA cases.

Respondents are wrong. The language of the statute, and this Court's decision in *City of Jackson*, leave no room for their interpretation. The identical language of the ADEA and Title VII has the identical meaning, implemented through the same test, which this Court set forth in *Wards Cove*. Congress took into account the differences between age and other forms of discrimination by providing employers a generous affirmative defense in the RFOA provision and by *leaving in place* the *Wards Cove* test for ADEA cases when it lowered the bar for Title VII plaintiffs in the Civil Rights Act of 1991. If respondents believe that these accommodations were insufficiently generous to employers, they must seek relief from the legislature, not from this Court.

I. An ADEA Plaintiff Need Not Prove An Employer's Conduct Is Unreasonable In Order To Show That It Has A Disparate Impact "Because Of" Age.

Respondents' argument depends on two propositions that are precluded by *City of Jackson* and the plain text of the ADEA. First, they must convince the Court that "because of" means two very different things in the ADEA and Title VII. Second, they must demonstrate that an employment practice cannot have a disparate impact "because of . . . age," unless it is unreasonable. They can do neither.

1. In *City of Jackson*, the Court explained that the language of Section 4(a)(2) was "derived *in haec verba* from Title VII," giving rise to the strong presumption that Congress "intended that text to have the same

meaning in both statutes." 544 U.S. at 233-34 (plurality opinion) (citation omitted).[1] Furthermore, *City of Jackson* made clear that this common meaning is implemented through the same test: the one this Court established in *Wards Cove*. *Id.* at 241. The Court explained that when Congress modified the *Wards Cove* analysis in the Civil Rights Act of 1991, but applied those changes only to Title VII and not to the ADEA, Congress indicated its intent that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remain[] applicable to the ADEA." *Id.*

Respondents insist that the Court misspoke, and that all it really meant to say was only that *Wards Cove* applies to the extent that it teaches that "the persuasion burden ... must remain with the plaintiff." Br. 25-26 (citation omitted). That is an implausible reading of both this Court's opinion and the ADEA. The reason the Court believed *Wards Cove*, developed for Title VII, had any application to the ADEA at all was because of its prior conclusion that by using the same language in both statutes, Congress meant to define the same unlawful employment practice, defined by the same test. As discussed below, Congress accommodated the differences between age and other forms of discrimination elsewhere.

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[1] In *City of Jackson*, Justice Scalia concurred in the judgment, agreeing "with all of the Court's reasoning" in the plurality opinion, but would have found that reasoning a basis "not for independent determination" of the question before the Court, but as a reason to defer to the EEOC's views on the issue. 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment). For that reason, like Justice Scalia, petitioners speak of the plurality opinion as expressing the views of the "Court."

2. Even if respondents' view were not precluded by the Court's holding in *City of Jackson*, their assertion that a practice must be unreasonable in order to affect older workers "because of" age makes no sense either linguistically or in terms of the purposes of the statute.

a. The phrase "because of age" refers to causation. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989). In a provision proscribing disparate treatment, the phrase requires proof of intentional discrimination, *i.e.*, proof that the employer selected the plaintiff for adverse treatment because of her age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-10 (1993). In the disparate impact context, the "because of age" element requires the plaintiffs to prove that the challenged employment practice "has caused the [adverse employment action] *because of* their membership in a protected group." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1989) (emphasis added). They do so by showing, usually through statistical evidence, that the practice affects older workers disproportionately as a group, thereby demonstrating that the effect is felt by the particular plaintiff because of her age, rather than for some other reason specific to her. *Id.* Disparate impact plaintiffs thus establish that their treatment is "because of" a protected characteristic by satisfying the first step of *Wards Cove*. *See id.*; *Wards Cove*, 490 U.S. at 656-58.[3]

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[3] In this case, the jury was instructed that to meet this burden, plaintiffs were required to show that the statistical disparity they identified was "caused by the ages of the plaintiffs" and not, "on the other hand, by some other factors unrelated to the plaintiffs age," such as their "education, work performance, skills, flexibility and criticality . . . as compared to

Whether an employment practice is reasonable or not has no bearing on whether it affects older workers disproportionately because of their age. For example, an employer's decision to require workers for a particular position to be able to lift 50 pounds may or may not be reasonable, depending on the job. But it is very likely to have a disparate impact on older workers because of their age. And that likelihood does not change depending on whether or not the requirement is reasonable.

b. Respondents' theory also makes little sense in terms of the purposes of disparate impact analysis. Requiring the plaintiff to prove unreasonableness might make some sense if the point of the *Wards Cove* test were to provide a basis for concluding that the employer was engaging in *intentional* discrimination. Indeed, much of respondents' and their amicis' briefs seem premised on the unstated (and therefore undefended) assumption that the plaintiff's case-in-chief must be designed to give rise to an inference of intentional discrimination in order to satisfy the plaintiff's obligation to show that she has been discriminated against "because of" her age.[3]

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other similarly situated employees." Tr. 4734. The jury found, and the district court and court of appeals confirmed, that plaintiffs had satisfied that burden, despite respondents' insistence that petitioners were selected for termination because they were, in fact, the least critical and flexible workers in the lab. *See* J.A. 73 (jury verdict form finding that "plaintiffs have proven that a specific employment practice . . . had an adverse impact on the plaintiffs because of their age"); Pet. App. 85a-91a (district court); Pet. App. 58a-59a (court of appeals).

[3] Respondents use the language of disparate treatment when they complain, with seemingly intentional imprecision, that the *Wards Cove* showing in age cases "has less probative

But any such assumption would be mistaken. *City of Jackson* rejected the contention that the phrase "because of . . . age" in Section 4(a)(2) limits the ADEA to cases of intentional discrimination. *Compare* 544 U.S. 235-36 (plurality opinion), *and id.* at 243-44 (Scalia, J., concurring in part and concurring in the judgment), *with id.* at 248, 249 (O'Connor, J., concurring in the judgment). It is therefore unsurprising that the *Wards Cove* showing does not necessarily give rise to a strong inference of intentional discrimination, as it was not designed for that purpose. Instead, this Court has repeatedly recognized that disparate impact claims are available precisely in order to provide relief when practices are *not* intentionally discriminatory,[4] but nonetheless, even in the "absence of discriminatory intent," *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), "are discriminatory in operation," *id.* at 431, because they "operate as 'built-in headwinds' for [protected] groups and are unrelated to measuring job capability," *id.* at 432. *See also City of Jackson*, 544 U.S. at 234 (plurality opinion) (same under ADEA).[5]

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value," Br. 18, and therefore "warrants less suspicion," *id.* at 22. *See also* Chamber of Commerce Br. 8-11.

[4] *See, e.g., Watson*, 487 U.S. at 988 ("This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent."); *Wards Cove*, 490 U.S. at 645-46 (noting that under disparate impact theory "a facially neutral employment practice may be deemed violative of Title VII *without evidence* of the employer's subjective intent to discriminate . . . ." (emphasis added)).

[5] For this reason, respondents also miss the mark when they assert that petitioners' interpretation is "functionally at odds" with the RFOA provision because a plaintiff who has proven "pretext" at final stage of *Wards Cove* has established

3. The purpose of the RFOA provision thus is not to negate the "because of age" requirement in Section 4(a)(2). If the plaintiff fails to establish that the action is "because of age" – either by showing intentional discrimination in a disparate treatment case, or by showing that a practice affects older workers disproportionately because of their age in a disparate impact case – the RFOA provision is simply inapplicable "since there would be no liability under § 4(a)." *Id.* at 238-39. The provision instead "plays its principal role" when the plaintiff has proven a disparate impact in violation of Section 4(a)(2), by establishing that an employer's practices have an unjustified disparate impact on workers "because of" their age. *Id.* at 239. And in such circumstances, it is not enough for the employer to show that the treatment was based on a nonage factor. Instead, the RFOA provision "preclud[es] liability if the adverse impact was attributable to a nonage factor *that was 'reasonable.'*" *Id.* (emphasis added); *compare* Chamber of Commerce Br. 10 (omitting italicized phrase from quotation).

Accordingly, in raising an RFOA defense, the defendant is not simply saying "not so" to the plaintiff's allegation that its practices violate Section 4(a)(2). It is saying, "*even if so*, the practice is nonetheless reasonable and therefore exempt from liability." *Contra* Chamber of Commerce Br. 8-9. And that is the classic claim of an affirmative defense.

4. Stripped of its purported textual hook, respondents' argument reduces to the simple

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intentional discrimination. Br. 27-28. Proof of disparate impact under *Wards Cove* does not establish intentional discrimination, nor is it designed to.

assertion that given the differences between age and other forms of discrimination, Congress could not have intended to define the unlawful employment practice set forth in Section 4(a)(2) in accordance with the same *Wards Cove* test that governed Title VII claims. That assertion is unsupported as well.

Congress was well aware of the differences between age and other forms of discrimination. *See City of Jackson*, 544 U.S. at 240-41. But rather than leave it to the courts to decide for themselves how those differences should affect the elements and burdens of an ADEA case, Congress created "[t]wo textual differences between the ADEA and Title VII" to ensure that "the scope of disparate-impact liability under the ADEA is narrower than under Title VII." *Id.* at 240.

"The first is the RFOA provision," *id.*, which is unavailable to any other employment discrimination defendant. As discussed in petitioners' opening brief, that defense provides substantial protection for employers. Pet. Br. 35-36.

In addition, Congress responded to the differences between age and other kinds of discrimination by adjusting the burdens of proof under *Wards Cove* to ensure that age discrimination plaintiffs bear a greater burden than Title VII plaintiffs before an employer's conduct is deemed presumptively unlawful. 544 U.S. at 240 (citing Civil Rights Act of 1991, 105 Stat. 1071). Congress accomplished this by *lowering* the bar for Title VII plaintiffs in the Civil Rights Act of 1991 while leaving in place the *Wards Cove* burdens for claims under the ADEA. *Id.* It would be inappropriate for this Court, based on precisely the same policy considerations, to judicially impose yet a further modification of the *Wards Cove*

test by *raising* the bar for ADEA plaintiffs while leaving the current standard in place under Title VII.

Congress's accommodation is entirely reasonable. Importantly, petitioners do *not* claim that showing that a practice has a "statistical adverse impact on older workers," Br. 22, is sufficient grounds to shift the burden to the employer to defend the reasonableness of its actions. Instead, in our view, the burden shifts only after the plaintiff has also established that the employer could have avoided the impact by adopting an equally effective alternative practice, but chose not to. That showing is by no means easy, and many disparate impact claims founder upon it. But when that showing *is* made, there is every reason to believe that Congress would have thought that a practice that *unnecessarily* imposes substantial burdens on the employment opportunities of older workers should be presumptively illegal and a basis for liability if the employer cannot show that the practice is even *reasonable*. And it is not difficult to believe that, having provided employers a quite capacious defense, Congress would require the employer to make the modest showing required to obtain its protection.

II. The Text Of The ADEA Establishes The RFOA Provision As An Affirmative Defense.

Even if respondents' policy arguments were more persuasive, they would not overcome the clear contrary implications of the statutory text.

A. In Establishing The RFOA Provision As An Exception To The General Prohibition In Section 4(a)(2), Congress Used The Traditional Formulation Of An Affirmative Defense.

Petitioners' opening brief explained that this Court has consistently determined whether a statutory provision establishes an affirmative defense by looking first and foremost to the text of the statute itself, applying the "general rule" that "the burden of proof is on . . . [the] one [who] claims the benefits of an exception to the prohibition of a statute." *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967); *see* Pet. Br. 21-23.

Respondents briefly assert that because Section 4(f)(1) applies to conduct that is "*otherwise* prohibited" – instead of simply "prohibited" – it does not create an exemption from liability. Br. 32-33. But the phrase "otherwise prohibited" is a common idiom, easily understood to refer to conduct that would otherwise violate the Act unless falling within the exemptions that follow.

That Congress intended the "otherwise prohibited" language to signify an exemption from liability is illustrated by the very different formulation it used in Section 4(f)(3). That provision states that "[i]t shall not be unlawful for an employer . . . to discharge or otherwise discipline an individual for good cause." 29 U.S.C. § 623(f)(3). The exclusion of the "otherwise prohibited" language is understandable because subsection (f)(3) simply restates what was already implicit in the statute – terminations for cause are neither intentional age discrimination nor a conceivable basis for a successful

disparate impact claim. And it shows that Congress was, indeed, being careful with the language that it used in setting forth the affirmative defenses elsewhere in the statute.

B. The Decision In *Betts* Confirms That Exceptions To Liability Are Treated As Affirmative Defenses Absent Strong Indications Of A Contrary Legislative Intent.

Respondents reply that even if the RFOA provision is structured as an exemption from liability, that is no ground for treating it as an affirmative defense, citing to this Court's decision in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989). Br. 30. But that decision "cannot bear the weight [respondents] assign it." *Id.*

In *Betts*, the Court considered Section 4(f)(2) of the ADEA, which at the time provided in relevant part that

> It shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . because of the age of such individual.

29 U.S.C. § 623(f)(2) (1988).

The Court acknowledged that this language "appears on first reading to describe an affirmative defense." *Betts*, 492 U.S. at 181. The Court had reached the same conclusion with respect to the parallel provision of Title VII in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989). Indeed, in *Lorance* the Court acknowledged that it had

construed the same formulation as establishing an affirmative defense in the case of bona fide occupational qualifications. *Id.*

But the most natural construction of the language and structure of the statute was overcome by strong counter-indications of legislative intent.[6] The legislative history of the ADEA showed that Congress recognized that seniority systems implicate especially strong reliance interests that federal civil rights statutes should not lightly disturb. *Betts*, 492 at 178-79;[7] *see also Lorance*, 490 U.S. at 904 (reaching same conclusion with respect to Title VII); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 76-77 (1982). The legislative history also showed that Congress likewise understood that "'all retirement plans necessarily make distinctions based on age,'" *Betts*, 492 at 177-78 (citation omitted), and decided that "'the age discrimination law is not the proper place to fight' the battle of ensuring 'adequate pension benefits for older workers,'" *id.* at 179 (quoting 113

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[6] Of course, Congress subsequently overruled the result in *Betts* by amending Section 4(f)(2) to expressly place the burden of proof on employers. *See* Pet. Br. 43-44. As respondents acknowledge, this explains why the burden of proof is expressly addressed in Section 4(f)(2) but not 4(f)(1). Resp. Br. 46. Accordingly, no negative inference can be drawn from the fact that Section 4(f)(2) expressly places the burden of proof on the employer, while Section 4(f)(1) is silent on the question, as shown by the fact that this Court has already construed the BFOQ clause of Section 4(f)(1) as an affirmative defense. Pet. Br. 27.

[7] Section 703(h) of Title VII has a similar legislative history. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758-62 (1976).

Cong. Rec. 7,076 (1967) (statement of Sen. Javits, sponsor of the amendment creating Section 4(f)(2))).[8]

Respondents have pointed to no comparable counter-indications of legislative intent in the text or legislative history of the ADEA with respect to the catch-all RFOA defense.

C. Other Textual Cues Confirm That Congress Intended The Courts To Give The Language Of The RFOA An Ordinary Interpretation As An Affirmative Defense.

Finally, respondents have offered no adequate response to petitioners' demonstration that other aspects of the text of the ADEA confirm that Congress intended the RFOA to be given the interpretation its language and structure would ordinarily require.

Respondents do not contest that the RFOA provision is sandwiched between two other affirmative defenses, the BFOQ and the foreign law exceptions. Br. 31-32. Although respondents explain in some detail the uncontested point that the various defenses play different roles under the statute, they offer no explanation as to why Congress would have set out all three exemptions as neighboring clauses in the same sentence, yet expect the courts to divine its intention that one of the three really modified the definition of an unlawful employment practice while the other two provided affirmative defenses to the

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[8] *Betts* is also distinguishable because the text of the RFOA provision points much more strongly toward an affirmative defense than did Section 4(f)(2) as it stood at the time. *See* Pet. Br. 42 n.28 (noting provision did not contain exemption-emphasizing "otherwise prohibited" language).

unlawful employment practice defined separately elsewhere in the statute. Indeed, respondents have pointed to no other statute in which Congress has done anything of the sort.

Likewise, while there are undoubtedly differences between the Equal Pay Act and the ADEA, it is hard to imagine that Congress would have thought that it was doing anything other than establishing an affirmative defense when it adopted the language of another affirmative defense to provide an exemption from liability in a parallel employment discrimination statute. *See City of Jackson*, 544 U.S. at 233.

III. Respondents' Policy-Based Criticisms Of Petitioners' Interpretation Are Misplaced.

Respondents' other policy objections to a plain reading of the RFOA provision are equally meritless.

1. Implementing the RFOA as an affirmative defense is not "unworkably complex." Br. 26-27. It simply requires that the jury conduct the traditional *Wards Cove* analysis (which has not proven unworkable in Title VII cases) and, if satisfied, determine whether the practice is nonetheless reasonable (which respondents would require them to decide in any event).

This Court rejected an argument similar to respondents' in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There, the Court held that in a mixed motive case, the plaintiff bears the burden of proving that the defendant took sex into account when taking an adverse employment action, at which point the employer may, as an affirmative defense, avoid liability by proving that it would have taken the same

action anyway. *Id.* at 246. Although both questions center on the employer's intent, the Court rejected the defendant's assertion that because the plaintiff bore the burden of proving she was discriminated against "because of" her sex, she should also bear the burden of disproving the employer's assertion that it would have taken the same action even if it had not considered her sex. *Id.* at 246-47. The Court likewise rejected the claim, echoed here, that adding an affirmative defense to the already-complex *McDonnell-Douglas* burden-shifting regime would prove unworkably complex. "The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. Juries long have decided cases in which defendants raised affirmative defenses." *Id.* at 247 (internal cross-reference omitted).

2. Respondents further argue that considerations of "access to information" and the likelihood of unreasonableness weigh in favor of placing the RFOA burden of proof on plaintiffs. Br. 34-35. But their observation that informational disadvantages can be reduced by assigning the defendant the burden of production and permitting discovery, applies to every case in which courts have found that the defendants' access to information supports placing the burden of proof on the defendant. Nor are such measures an adequate substitute in this context. *See* Pet. Br. 33-34 & n.20; AARP Br. 20-25.

Moreover, the question is not whether it is an "uncommon occurrence" for reasonable employment practices to have "a statistical adverse impact on older workers." Br. 35. The question is whether Congress would have thought that employment practices that fail the entirety of the *Wards Cove* analysis – *i.e.*, cases in which a plaintiff has shown

both disparate impact *and* that the defendant has forgone equally effective alternatives – are likely enough to be unreasonable that it should fall upon the employer to prove the reasonableness of its actions. And there is every reason to believe that Congress would have thought so, particularly in light of the fact that it had provided that such a showing is sufficient to *conclusively* establish liability under Title VII.

3. Finally, respondents' amici claim at some length that reading the statute as petitioners propose will create all manner of harms on employers, the economy, and the national education system. Such claims are baseless. It is undisputed that reasonable business practices are exempt from disparate impact liability under the ADEA. The only question here is which party bears the risk of non-persuasion when the evidence of reasonableness balances in complete equilibrium. "In truth, however, very few cases will be in evidentiary equipoise." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58 (2005). And while it is not difficult for lawyers to hypothesize that an unfavorable outcome in this, or any other case, will have incentive effects in the real world, it is difficult to believe – and amici provide no concrete evidence to suggest – that employers will adjust their practices depending on the answer to the technical question in this case. In any event, if the text of the statute requires a rule employers find disadvantageous, their complaint is with Congress, from whom they may seek relief.

* * * * *

As Justice Scalia has explained, the Court's "highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work

the people's will." *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting). The Congress that enacted the RFOA provision as an exemption from liability for "otherwise prohibited" conduct had every reason to expect that the courts would construe it as they had many other similarly formulated affirmative defenses. Respondents, on the other hand, invite the Court to treat the burden of proof question as a matter of policy judgment for the courts upon which the text of the statute has little bearing. That approach risks not only misconstruing the statute at hand, but also "poison[ing] the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning." *Id.*

IV. Any Ambiguity Should Be Resolved By Deferring To The EEOC's Reasonable Construction Of The Act.

In petitioners' view, the statute unambiguously establishes the RFOA provision as an affirmative defense. But if this Court disagrees, it should defer to the reasonable and persuasive views of the EEOC.

A. The EEOC's Conclusion That The RFOA Provision Creates An Affirmative Defense Is Entitled To *Chevron* Deference If The Text Of The Statute Does Not Resolve The Question.

There is no question that in the "authoritative view" of the EEOC, the RFOA provision is an affirmative defense. *Christensen v. Harris County*, 529 U.S. 576, 591 (2000) (Scalia, J., concurring in part and concurring in the judgment); *see* U.S. Br. 11-12. Nor is there any doubt that the Commission

construes its notice-and-comment regulations as embodying that position. *Id.* at 11. The only dispute is over the level of deference that position deserves, which is ultimately immaterial because the Commission's interpretation is not only reasonable, but entirely persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Nonetheless, respondents' reasons for withholding *Chevron* deference are unconvincing.

First, respondents argue that the EEOC's construction of its own regulation is unreasonable because 29 C.F.R. § 1625.7(e) does not apply to cases of disparate impact. They point out that the regulation speaks of "individual claims of discriminatory treatment," language that connotes first and foremost disparate treatment claims. But the term "discriminatory treatment" is broad enough to encompass all the forms of discrimination the ADEA prohibits, including both disparate treatment and adverse impact. And elsewhere in its regulations, when the Commission meant to speak solely of disparate treatment it used the term of art "disparate treatment" not the broader and more generic phrase "discriminatory treatment." *See, e.g.*, 29 C.F.R. § 1607.11; *id.* § 1608.4(a); *id.* § 1630.15(a); *see also* Chamber of Commerce Br. 29 (acknowledging that "'disparate treatment'" is "a term of art in civil rights law").[9]

Thus, although the regulation is not a model of clarity, it bears the reasonable interpretation the

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[9] The reference to "individual claims" may simply indicate that the EEOC did not intend to address collective actions involving pattern and practice claims, which are subject to their own separate burden-shifting regime. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 & n.46 (1977).

EEOC gives it. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). And as a result, there is no basis for respondents' assertion that the interpretation is not entitled to deference because it varies substantively from the Department of Labor's prior construction or the EEOC's proposed clarification (which, respondents fail to mention, is expressly intended to "reiterate the Commission's longstanding position that the RFOA provision creates an affirmative defense that the employer must establish," 73 Fed. Reg. 16,807, 16,808 (Mar. 31, 2008)). *See* App. (full text of notice).

Second, this Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007), makes clear that the agency did not forfeit the right to *Chevron* deference by labeling its notice-and-comment regulations "interpretations." *Contra* Resp. Br. 40-41. Here, Congress delegated the EEOC broad authority to construe the substance of the ADEA through rulemaking. *See* 29 U.S.C. § 628. The regulations it promulgated fall within that authority, *see id.*, and were issued through the notice-and-comment machinery of substantive rulemaking, *see* 46 Fed. Reg. 47,724, 47,727 (1981); *Long Island Care at Home*, 127 S. Ct. at 2350. Thus, there is no reason to believe that the EEOC "intended its . . . regulation to carry no special legal weight." *Id.* Moreover, as respondents' policy-filled brief illustrates, the legal issue in this case turns in significant part on a balancing of conflicting policy interests, upon which the agency has special expertise. *See Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008); *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990); *cf. also* 29 U.S.C. § 628 (giving EEOC authority to issue regulations "establish[ing] such reasonable exemptions to and from any or all

provisions of this chapter as it may find necessary and proper in the public interest").

Third, the nature of the RFOA provision is a question of substantive law, not courtroom procedure.[10] *Contra* Resp. Br. 42. That an agency's view on the meaning of a statute may have an incidental effect on the administration of judicial proceedings does not render it an illegitimate attempt to "bootstrap [the agency] into an area in which it has no jurisdiction." *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (citation omitted).

B. If The Court Concludes That The RFOA Provision Substitutes For The "Business Necessity" Test, It Should Defer To The EEOC's Position That The Defendant Bears The Burden Of Proof On Reasonableness Once The Plaintiff Establishes A Statistical Disparate Impact.

In petitioners' view, the statute unambiguously establishes the RFOA provision as an affirmative defense and requires plaintiffs to satisfy the full *Wards Cove* test as part of their case-in-chief. If, however, this Court disagrees and concludes, as urged by respondents and the EEOC, that the *Wards Cove* analysis should be modified to incorporate

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[10] *Cf., e.g., Am. Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994) ("For many years, [the burden of proof] has been viewed as a matter of substance.") (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942) (stating that the right of the plaintiff to be free of the burden of proof "inhered in his cause of action" and "was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure")).

considerations of reasonableness, the EEOC's position provides the best possible reading of the statute.

Respondents complain that the EEOC's position "relieves plaintiffs of the burden of proving discrimination," because employees are required to meet only the first step of the *Wards Cove* analysis before the burden of persuasion on reasonableness shifts to the employer. Br. 28. But respondents themselves insist that the traditional *Wards Cove* analysis does not describe the unlawful employment practice defined in Section 4(a)(2). Br. 23-24. If the Court accepts respondents' invitation to abandon the traditional meaning of the words of that provision, as set forth in the *Wards Cove* test, respondents can hardly complain that the EEOC's construction adheres only partially to the prior formulation.

Moreover, it is important to bear in mind that the differences between respondents' and the EEOC's views are really quite minor. Both agree that once the plaintiff has shown a substantial disparate impact because of age, the burden of production shifts to the employer to articulate a reasonable basis for its practice and to come forward with evidence in support of that assertion. Resp. Br. 35; U.S. Br. 9-10. The only difference is in their views over which side then bears the risk of non-persuasion in the unusual case in which the evidence regarding reasonableness is completely in equipoise. On that question, the text of the statute still controls and, for all the reasons described above, that text and the agency's reasonable interpretation of it compel the conclusion that the employer bears the burden of proving reasonableness.

Finally, respondents are simply wrong in asserting that under the Commission's construction of the statute, the scope of disparate impact liability is broader under the ADEA than it is under Title VII. While the employer may be somewhat disadvantaged in bearing the risk of non-persuasion, the breadth of the reasonableness defense more than "make[s] up for the disadvantage of" being assigned the burden of persuasion. Br. 29. After all, the broader defense benefits defendants in every ADEA case, while the burden of persuasion matters only when the evidence is in equipoise.

V. The Court Should Not Reach Respondents' Alternative Grounds For Affirmance.

If the Court finds that the RFOA provision establishes an affirmative defense, it should either find that respondents have waived the defense and order entry of judgment on the jury's verdict, or remand for further proceedings.

A. Respondents Forfeited Their Affirmative Defense By Abandoning It Before Trial.

Respondents argue that a party cannot be faulted for failing to assert an affirmative defense at trial when the defense was foreclosed by circuit precedent at the time. Petitioners do not dispute that point in principle, but it does not apply to this case, for two reasons.

First, nothing in the law of the Second Circuit foreclosed defendants from raising the RFOA provision as an affirmative defense. The one case respondents cite (Br. 20 n.54), *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999), simply held that a

plaintiff sustains her burden of proof in an ADEA disparate impact case by meeting the requirements of *Wards Cove*. *See id.* at 365. It said nothing about whether a defendant may yet prevail by interposing an RFOA affirmative defense. *Id.*; *see also, e.g., N.Y. 10-13 Ass'n, Inc. v. City of New York*, No. 98-Civ-1425, 2000 WL 1376101, at *10 (S.D.N.Y. Sept. 22, 2000) (dismissing ADEA disparate impact claim post-*City of Jackson* on the basis of the RFOA provision). Moreover, although the EEOC regulations may have misstated what was required to establish an RFOA defense, Br. 54 n.20, they said nothing to excuse a defendant from having to raise it.[11]

Second, even if respondents were entitled to some relief from their waiver because of intervening precedent, at most they would be entitled to a new trial, not to the opportunity to assert a right to judgment as a matter of law on the basis of a defense they never advanced and the jury never heard.[12] Because defendants did not raise reasonableness at trial, petitioners had no reason to develop any evidence on the subject or to vigorously challenge the evidence of reasonableness respondents put on. After all, respondents did not dispute that plaintiffs would

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[11] Respondents cannot plausibly claim to have relied on those regulations in any event, as they were simultaneously arguing below that the regulations were wrong to recognize a disparate impact claim in the first place. *See* Pet. App. 43a.

[12] Respondents say that it was plain error for the district court to fail to put the RFOA defense before the jury. Br. 54 n.20. But it is never error (much less plain error) for a trial court to decline to instruct a jury on an affirmative defense the defendant has abandoned. And, in any case, the remedy for an erroneous jury charge is a new trial, *see, e.g., Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 809 (2007), which respondents do not seek.

be entitled to prevail so long as they proved that the current practice – reasonable or not – had a disparate impact and that there were other equally effective alternatives. Indeed, for this reason, even if the Court accepts respondents' interpretation of the statute, the Court should vacate the decision below and remand for a new trial.

Respondents, however, have not asked for a new trial. And because they are not entitled to the relief they do seek, the Court should reverse and remand for restoration of the jury verdict in petitioners' favor.

B. This Court Should Not Decide In The First Instance Whether Respondents' Practices Were Reasonable As A Matter Of Law.

In the petition for certiorari, petitioners asked this Court to decide whether respondents' practices "constituted a 'reasonable factor other than age' as a matter of law." Pet. i (Second Question Presented). Among other things, petitioners argued that granting review would allow the Court to resolve outstanding legal confusion over the RFOA's reasonableness standard, including "whether the reasonableness analysis takes into account the degree of disparate impact caused by the defendant's chosen practice and the availability of alternatives . . . ." Pet. 28.

Respondents opposed, and this Court denied, certiorari on that question. Respondents now attempt to reintroduce that question into this case, asking the Court to decide whether their conduct was reasonable as a matter of law "regardless of who bears the burden." Resp. Br. i (Second Question Presented). This Court should deny that request.

Because respondents successfully opposed certiorari on the reasonableness question, petitioners did not address the necessary factual and legal questions in their opening brief, and lack the space to address them adequately now. At the same time, the denial has deprived this Court of the benefit of briefing on the question by the EEOC and the Solicitor General.

Moreover, this case is quite different from *City of Jackson*. There, the Court had no need to consider in detail the content of the reasonableness requirement, as the defendant's practice was "unquestionably reasonable." 544 U.S. at 242. Here, the closeness of the reasonableness question is what required the Second Circuit to decide the burden of proof question in the first place. Indeed, although petitioners did not focus at trial on the reasonableness of respondents' practices, they did show that respondents were, or should have been, aware that the broad delegation of discretion to front-line managers risked discrimination against older workers; that the "startlingly skewed results" of that discretionary process put them on notice that the theoretical risk was, indeed, quite real; and that respondents failed to implement even the basic safeguards they themselves had identified as reasonable measures to guard against discrimination in the IRIF process. Pet. Br. 7-11. The district judge, who heard all of the evidence, upheld the jury's finding of a *willful* violation of the ADEA by concluding that "[t]he jury was entitled to infer from [the] evidence that KAPL was motivated to disregard the disparate impact of the IRIF on older employees by its desire to hire new and younger employees." Pet. App. 100a.

D. The Court Should Not Entertain Respondents' Other Fact-Bound And Meritless Objections To The Decision Below.

Even less worthy of review is respondents' meritless and fact-bound challenge to the Second Circuit's *Wards Cove* analysis.

There is no basis for this Court to review the court of appeals' determination that petitioners adequately put before the jury the theory that "KAPL's 'unaudited and heavy reliance on subject assessments of 'criticality' and 'flexibility' in implementing the IRIF" caused an unlawful disparate on older workers. Pet. App. 7a. The court of appeals explained the basis for that conclusion in detail in its first opinion. *Id.* at 57a-59a. Notably, respondents did not ask the trial court to instruct the jury that in deciding whether petitioners had identified a specific employment practice, they were limited to the practices identified by counsel in his summation and were required to disregard the expert testimony breaking down the elements of the IRIF process and identifying the disparate impact of the subjective elements of criticality and flexibility.

For the same reason, the court of appeals did not err – and any asserted error would be unworthy of this Court's attention – in finding sufficient evidence of an equally effective alternative practice different than the ones petitioners identified below. The jury instructions were broad enough to permit the jury to find for petitioners on the ground the Second Circuit identified and the respondents do not argue here that the evidence was insufficient to support it. Moreover, even if this Court concluded that the court of appeals should have limited itself to the alternatives

petitioners identified, that would simply put before this Court the question whether those alternatives were legally sufficient. While respondents have baldly asserted that they are not, they have provided no arguments or authorities to support that position. *See* Br. 55.

Accordingly, if the Court finds that respondents have not waived the RFOA defense, it should remand the case for further proceedings.[13]

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[13] If there is a remand, it may be appropriate to return the case to the district court to decide the reasonableness question in the first instance, and to decide, if necessary, whether a new trial would be more appropriate than judgment as a matter of law. *See* Fed. R. Civ. P. 50(b); *Weisgram v. Marley Co.*, 528 U.S. 440, 443-44 (2000).

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed or, in the alternative, vacated and remanded for further proceedings.

Respectfully submitted,

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April 14, 2008

APPENDIX

EEOC Notice Of Proposed Rulemaking

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1625
RIN 3046-AA76

Disparate Impact Under the Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission ("EEOC" or "Commission") is issuing this notice of proposed rulemaking ("NPRM") to address issues related to the United States Supreme Court's decision in *Smith v. City of Jackson*. The Court ruled that disparate impact claims are cognizable under the Age Discrimination in Employment Act ("ADEA") but that liability is precluded when the impact is attributable to a reasonable factor other than age. Current EEOC regulations interpret the ADEA as prohibiting an employment practice that has a disparate impact on individuals within the protected age group unless it is justified as a business necessity.

DATES: Comments must be received on or before May 30, 2008. The Commission will consider any

comments received on or before the closing date and thereafter adopt final regulations. Comments received after the closing date will be considered to the extent practicable.

* * *

SUPPLEMENTARY INFORMATION: In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the United States Supreme Court held that the ADEA authorizes recovery for disparate impact claims of discrimination. This holding validated the Commission's longstanding rule that disparate impact analysis applies in ADEA cases. The Court also held that the "reasonable factors other than age" ("RFOA") test, rather than the business-necessity test, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals. This ruling differs from the EEOC's position that an employment practice that had a disparate impact on individuals within the protected age group could not be a reasonable factor other than age unless it was justified as a business necessity. The Commission proposes to amend its regulation to reflect the Supreme Court's decision.

Smith v. City of Jackson

The *Smith* plaintiffs, senior police and public safety officers, alleged that the defendant City's pay plan had a disparate impact on older workers because it gave proportionately larger pay increases to newer officers than to more senior officers. Older officers, who tended to hold senior positions, on average received raises that represented a smaller percentage of their salaries than did the raises given to younger officers. The City explained that, after a survey of

salaries in comparable communities, it raised the junior officers' salaries to make them competitive with those for comparable positions in the region. 544 U.S. at 241-42.

The Fifth Circuit Court of Appeals dismissed the plaintiffs' disparate impact claim on the ground that such claims "are categorically unavailable under the ADEA." *Id.* at 231. The Supreme Court disagreed and ruled that plaintiffs may challenge facially neutral employment practices under the ADEA. *Id.* at 233-40. The Court also ruled, however, that the "scope of disparate-impact liability under the ADEA is narrower than under Title VII" of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[14] 544 U.S. at 240.

In holding that disparate impact claims are cognizable under the ADEA, the Supreme Court relied in large part on the parallel prohibitory language and the common purposes of the ADEA and Title VII. *Id.* at 233-40. *Accord McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) (statutes share "common substantive features" and "common purpose: 'the elimination of discrimination in the workplace'") (quoting *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). The Court noted that, in passing the ADEA, Congress was concerned that application of facially neutral employment

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[14] Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court first recognized the disparate impact theory of discrimination under Title VII. The Court held that Title VII prohibits not only intentional discrimination but also employment practices that, because they have a disparate impact on a group protected by Title VII, are "fair in form but discriminatory in operation." *Id.* at 431.

standards, such as a high school diploma requirement, may "unfairly" limit the employment opportunities of older individuals. 544 U.S. at 235 n.5 (quoting Report of the Sec'y of Labor, The Older American Worker: Age Discrimination in Employment 3 (1965), *reprinted in* U.S. EEOC, Leg. History of the ADEA 21 (1981)) ("Wirtz Report"). The Court observed that there is a "remarkable similarity between the congressional goals" of Title VII and "those present in the Wirtz Report." 544 U.S. at 235 n.5.

At the same time, however, the Court identified two key textual differences that affect the relative scope of disparate impact liability under the two statutes. First, the ADEA contains the RFOA provision, which has no parallel in Title VII and precludes liability for actions "otherwise prohibited" by the statute "where the differentiation is based on reasonable factors other than age."[15] *Id.* at 240. Second, in reaction to the decision in *Wards Cove Packing Co. v. Atonio*,[16] which "narrowly construed the employer's exposure to liability on a disparate-impact

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[15] The Court found that the presence of the RFOA provision supported its conclusion that disparate impact claims are cognizable under the ADEA. 544 U.S. at 238-40. The RFOA provision "plays its principal role" in disparate impact cases, where it "preclud[es] liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" *Id.* at 239. Comparing the RFOA provision with the Equal Pay Act provision that precludes recovery when a pay differential is based on "any other factor other than sex," 29 U.S.C. 206(d)(1), the Court found it "instructive" that "Congress provided that employers could use only *reasonable* factors in defending a suit under the ADEA." 544 U.S. at 239 n.11 (emphasis in the original).

[16] 490 U.S. 642 (1989).

theory," Congress amended Title VII but not the ADEA. 544 U.S. at 240 (citing the Civil Rights Act of 1991, sec. 2, 105 Stat. 1071). Accordingly, "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240.[17]

Applying its analysis, the Court rejected the *Smith* plaintiffs' disparate impact claims on the merits. The Court ruled that the plaintiffs failed to satisfy *Wards Cove*'s requirement that they identify a "specific test, requirement, or practice within the pay plan that has an adverse impact on older workers." *Id.* at 241.

In addition, focusing on the plan's purpose, design, and implementation, the Court found that the City's pay plan was based on reasonable factors other than age. The Court noted that the City grouped officers by seniority in five ranks and set wage ranges based on salaries in comparable communities. Most of the officers were in the three lowest ranks, where age did not affect officers' pay. In the two highest ranks, where all of the officers were over 40, raises

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[17] The "identical" language is in section 703(a)(2) of Title VII (42 U.S.C. 2000e-2(a)(2)) and section 4(a)(2) of the ADEA (29 U.S.C. 623(a)(2)), which make it unlawful for employers "to limit, segregate, or classify" individuals in a manner that would

> deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's [protected status].

The language of the two statutes significantly differs, however, with regard to the applicable defense. Unlike the ADEA, which provides a defense when the practice is based on a reasonable factor other than age (29 U.S.C. 623(f)(1)), Title VII provides a defense only when the practice is job related and consistent with business necessity (42 U.S.C. 2000e-2(k)(1)(A)).

were higher in terms of dollar amounts; they were lower only in terms of percentage of salary. The Court concluded that the plan, as designed and administered, "was a decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers." *Id.* at 242.

Finally, the Court noted that, although "there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable." Unlike Title VII's business necessity defense, which requires the employer to use the least discriminatory alternative, "the reasonableness inquiry includes no such requirement." *Id.* at 243.

Revisions to Agency Regulations

The Commission proposes to revise current paragraph 1625.7(d) to state that an employment practice that has an adverse impact on individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age" (RFOA). This revision reflects the Supreme Court's conclusion that disparate impact claims are cognizable under the ADEA and that the RFOA test, rather than the business-necessity test, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals.

The proposed revision also states that the individual challenging the allegedly unlawful employment practice bears the burden of isolating and identifying the specific employment practice responsible for the adverse impact. As the Supreme Court stressed in *Smith*, "it is not enough to simply allege that there is a disparate impact on workers, or

point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'"[18]

The Commission proposes to revise current paragraph 1625.7(e) to state that, when the RFOA exception is raised, the employer has the burden of showing that a reasonable factor other than age exists factually. This section reiterates the Commission's longstanding position that the RFOA provision creates an affirmative defense that the employer must establish.[19]

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[18] *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (quoting *Wards Cove*, 490 U.S. at 656) (emphasis in *Smith*).

[19] Until recently, most courts treated RFOA as an affirmative defense. *See, e.g., Enlow v. Salem-Keizer Yellow Cab Co., Inc.* 389 F.3d 802, 807-08 (9th Cir. 2004) (in the context of a disparate treatment claim, characterizing the RFOA as an affirmative defense and holding that it was unavailable where the challenged practice is based on age), *cert. denied*, 544 U.S. 974 (2005); *E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1541 (2d Cir. 1996) (same), *cert. denied*, 522 U.S. 808 (1997). However, the Second and Tenth Circuits have recently concluded that defendants bear only the burden of production, not the burden of persuasion, on the issue. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 141-43 (2d Cir. 2006), *cert. granted*, 76 U.S.L.W. 3391 (U.S. Jan. 18, 2008) (No. 06-1505); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006). *But see Meacham*, 461 F3d at 147-53 (Pooler, J., dissenting) (RFOA is an affirmative defense). The court in *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980 (E.D. Mo. 2006), *certification for interlocutory appeal on other grounds granted*, 2007 WL 38675 (E.D. Mo. Jan. 4, 2007), did not analyze the issue but followed the lead of *Pippin* and *Meacham* to conclude that the defendant did not bear the burden of proof. For the reasons explained in the text and accompanying footnotes, the

Requiring the employer to bear the burden of proof is consistent with the language and structure of the ADEA. The RFOA provision is found in section 4(f)(1) of the ADEA, which states that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited [by the ADEA] where age is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). Since the employer indisputably bears the burden of proving BFOQ,[20] the most natural construction of section 4(f)(1) as a whole is that the employer similarly bears the burden of proving RFOA. In addition, when Congress enacted the Older Workers Benefit Protection Act ("OWBPA") amendments to the ADEA in 1990, it specifically stated that the employer bears the burden of proof on the RFOA affirmative defense in section 4(f)(1). S. Rep. No. 101-263, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1509, 1535 (noting that Congress was incorporating into section 4(f)(2) "the language of [section] 4(f)(1) that is commonly understood to signify an affirmative defense"). This approach also is consistent with the allocation of burdens under the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1), which precludes liability when the employer establishes that a pay differential is "based on any other factor other than sex," 29 U.S.C. 206(d)(1)(iv).[21] The *Smith*

Commission disagrees with *Meacham* and *Pippin* and concludes that the RFOA burden of proof rests with the employer.

[20] *See Smith*, 544 U.S. at 233 n.3 (2005) (referring to the BFOQ provision as "an affirmative defense to liability").

[21] *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (shifting the burden of proof to the employer "is

Court did not need to discuss the burden of proof because the employer's actions were so eminently reasonable that it easily prevailed regardless of who bore the ultimate burden.

The Commission invites comments on these proposed changes from all interested parties. The Commission also invites comments on whether the regulations should address other matters concerning the application of the disparate impact theory of discrimination under the ADEA. In particular, the Commission would welcome comments on the following specific question:

1. Should the regulations provide more information on the meaning of "reasonable factors other than age"? If so, what should the regulations say? For example, should the regulations refer to tort law standards such as negligence and reasonable standard of care when addressing the meaning of "reasonable"? Should the regulations offer factors relevant to whether an employment practice is based on reasonable factors other than age? If so, what should those factors be?

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For the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR chapter XIV part 1625 as follows:

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consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof").

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

1. The authority citation for part 1625 continues to read as follows:

Authority: 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary's Order No. 10-68; Secretary's Order No. 11-68; Sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 12, 29 U.S.C. 631, Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

SUBPART A—INTERPRETATIONS

2. Revise paragraphs (d) and (e) of § 1625.7 to read as follows:

§ 1625.7 Differentiations based on reasonable factors other than age.

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(d) Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparities.

(e) Whenever the exception of "a reasonable factor other than age" is raised, the employer bears the burden of proving that the "reasonable factor other than age" exists factually.

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